Supreme Court, U.S.
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No. 96-1901

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALAN D. EMERSON, D/B/A
EMERSON AVIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a one-year revocation of petitioner's airman certificate by the Federal Aviation Administration (FAA) after repeated violations of FAA regulations, followed by imposition of civil penalties based on the same violations, constituted multiple punishment in violation of the Double Jeopardy Clause of the Fifth Amendment.

2. Whether the $185,000 civil penalty imposed by the district court on petitioner for 37 violations of FAA regulations violated the Excessive Fines Clause of the Eighth Amendment.

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ALAN D. EMERSON, D/B/A
EMERSON AVIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 107 F.3d 77. The opinion of the district court entering judgment for the government and setting the amount of the penalty against petitioner (Pet. App. 15-31) is reported at 927 F. Supp. 23. An earlier district court opinion rejecting petitioner's double jeopardy claim (App., *infra*, 1a-14a) is unreported. The order of the Federal Aviation Administration (FAA) revoking petitioner's airman certificate (App., *infra*, 15a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1997. The petition for a writ of

certiorari was filed on May 27, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Transportation is authorized by Congress to promote the "safety of flight of civil aircraft in air commerce." 49 U.S.C. App. 1421(a) (1988 & Supp. V 1993).[1] Pursuant to that authority, the Secretary has also been authorized to issue airman certificates for purposes of air commerce. 49 U.S.C. App. 1422 (1988 & Supp. V 1993). The Secretary may revoke airman certificates as "safety in air commerce or air transportation and the public interest require[]." 49 U.S.C. 1429(a) (1988 & Supp. V 1988). Anyone who operates aircraft for the carriage of persons or property for compensation or hire without an airman certificate is subject to a civil penalty of up to $10,000 for each violation. 49 U.S.C. 1471 (1988 & Supp. V 1993). In addition, under FAA regulations, no person may operate aircraft exceeding certain capacity limits for carriage of persons or property for compensation or hire without an air taxi operating certificate. 14 C.F.R. 135.1(a)(3), 135.5 (1988).

2. On May 12, 1992, the FAA issued orders revoking petitioner's airman certificate, and also revoking the air taxi commercial operations certificate (ATCO) of Emerson Aviation, petitioner's sole proprietorship. Pet. App. 19. Those actions were based

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[1] The provisions of Title 49 relating to aviation have been completely recodified since the events in this case. See Pub. L. No. 103-272, 108 Stat. 1094. Because the lower courts applied the earlier version of Title 49, we have cited to that version in this brief. No substantive change pertinent to this case was effected by the recodification.

on several violations of air safety rules, including operating an aircraft known to be unairworthy. *Id.* at 3. Both of the revoked certificates were required to operate commercial charter flights. *Id.* at 2. Despite those revocations, petitioner operated numerous commercial charter flights from June 1992 through July 1993, carrying passengers on each flight. *Id.* at 16. Each of those flights was made in violation of 49 U.S.C. App. 1471(a)(1) (1988 & Supp. V 1993).

On February 16, 1994, upon discovering the illegal charter operations being conducted by petitioner, the FAA issued an emergency order again revoking petitioner's airman certificate.[2] App., *infra*, 15a-23a. That revocation was based on findings that petitioner was responsible for operating more than 30 unlawful flights while he lacked the proper qualifications to do so and while Emerson Aircraft lacked an ATCO certificate. *Id.* at 16a-17a; see Pet. App. 24. The FAA also noted that petitioner had been sanctioned on other occasions for regulatory violations. App., *infra*, 20a. Petitioner did not contest the 1994 revocation of his airman certificate.

3. On March 29, 1995, the United States filed a complaint against petitioner in district court, seeking civil penalties for each of the unlawful flights that had triggered the FAA's revocation of his airman certificate. Petitioner moved for dismissal of the complaint, arguing that the civil penalty proceeding was an impermissible second punishment for his regulatory infractions, in violation of the Double

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[2] We are informed that, under the terms applicable to the initial revocation of his airman certificate in 1992, petitioner was eligible to reapply for an airman certificate after one year, and that he did so successfully.

Jeopardy Clause of the Fifth Amendment. The district court denied the motion, concluding that the 1994 revocation was remedial in nature and did not constitute punishment for purposes of the Double Jeopardy Clause. App., *infra*, 12a-14a.

The district court subsequently concluded that petitioner was responsible for 37 separate violations of FAA regulations. Pet. App. 15-17. After a bench trial on the amount of the sanction, the district court imposed a civil penalty of $5,000 per violation, for a total of $185,000. *Id.* at 24. The court imposed a penalty less than the $8,500 per violation requested by the United States because of petitioner's limited ability to pay. *Id.* at 28-29. The court nonetheless noted that, but for petitioner's financial condition, it would have been "inclined to award a * * * penalty at or near the magnitude requested by the government given the nature, circumstances, extent, and gravity of [petitioner's] violations, [his] high level of culpability, extensive enforcement history, and the high potential to deter future violations." *Id.* at 28.

4. Petitioner appealed, arguing that the civil penalty imposed by the district court violated the Excessive Fines Clause of the Eighth Amendment as well as the Double Jeopardy Clause. The court of appeals rejected both contentions. Pet. App. 1-14.

The court first held that the penalty of $5,000 per violation, totaling $185,000, was not excessive. The court noted that the penalty imposed by the district court was well within the statutory maximum of $10,000 per violation, that the district court had carefully balanced the seriousness of petitioner's violations against his limited means, and that the resulting penalty bore a reasonable relationship to both the violations and the violator. Pet. App. 7-8.

The court remarked that, although petitioner "appears at present not to have the resources to pay the entire penalty, he is employed and, still in his early 50s, should have longterm future earning potential." *Id.* at 8. Should petitioner's future prospects become "more clearly limited," the court stated, he could seek "an amelioration from the district court." *Ibid.*

The court of appeals also held that the monetary penalty was not barred by the Double Jeopardy Clause. That argument failed, the court explained, because the 1994 revocation of petitioner's airman certificate based on the violations that also led to the monetary penalty was remedial rather than punitive in nature, and therefore the monetary penalty could not be considered a second punishment. Pet. App. 9. The court stressed that the agency's revocation order reflected a "focus on considerations of air safety rather than on punishment," *id.* at 11, and that "the emphasis here is not on slapping [petitioner's] wrist but on preventing him from continuing to present a safety risk. He is deprived of his Airman Certification not as punishment for bad conduct, but because he is 'not qualified.'" *Id.* at 12.

The court acknowledged that "the loss of [petitioner's] license has had a severe impact on [petitioner] and his aviation business," and that "the FAA's more serious enforcement measures are designed with deterrence at least partially in mind." Pet. App. 13-14. Nonetheless, the court concluded, "the fact that something akin to punishment occurs along with, and incidental to, a sanction's overriding remedial purpose will not transform a permissible civil penalty into a prohibited multiple punishment," and likewise, "deterrence should be an anticipated

byproduct of aggressive safety enforcement." *Id.* at 14. The court concluded ultimately that "the evidence persuades us that the sanction displays colors more consistent with the remedial end of the spectrum." *Ibid.* (citation and internal quotation marks omitted).

ARGUMENT

The court of appeals correctly ruled that the FAA's revocation of petitioner's airman certificate did not constitute punishment for purposes of the Double Jeopardy Clause, and that the monetary penalty imposed did not violate the Excessive Fines Clause. Those holdings do not conflict with any decision of any other court of appeals or of this Court. Further review is therefore not warranted.

1. A trilogy of recent cases of this Court has addressed whether civil sanctions may constitute punishment for purposes of the Double Jeopardy Clause. None of those cases involved an administrative license revocation. In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court stated that, in a "rare case," where a "fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused," *id.* at 449, the imposition of monetary civil penalties that "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes," *id.* at 448, may constitute punishment. In *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767, 784 (1994), the Court concluded that a dangerous-drug tax imposed only on illegal conduct was "the functional equivalent of a second criminal prosecution." Finally, in *United States* v. *Ursery*, 116 S. Ct. 2135, 2142 (1996), the Court held that a civil

forfeiture provision designed by Congress as remedial did not constitute punishment for double jeopardy purposes because the statutory scheme was not "so punitive either in purpose or effect" as to negate Congress's expressed intent.

Applying the principles of those three precedents to sanctions such as administrative license revocations and debarments, the courts of appeals have uniformly held that such sanctions are not punishment for purposes of the Double Jeopardy Clause because they serve the predominantly remedial goal of protecting the public from harm or protecting the integrity of a government program from impairment. See *United States* v. *Imngren*, 98 F.3d 811 (4th Cir. 1996) (suspension of driving privileges); *United States* v. *Glymph*, 96 F.3d 722 (4th Cir. 1996) (debarment from government contracting); *United States* v. *Borjesson*, 92 F.3d 954 (9th Cir.) (debarment from HUD programs), cert. denied, 117 S. Ct. 622 (1996); *Allen* v. *Attorney General of Maine*, 80 F.3d 569 (1st Cir. 1996) (suspension of driver's license); *United States* v. *Stoller*, 78 F.3d 710 (1st Cir.) (ban from service in any federally insured bank), cert. dismissed, 117 S. Ct. 378 (1996); *DiCola* v. *FDA*, 77 F.3d 504 (D.C. Cir. 1996) (debarment from providing services to pharmaceutical companies); *Bae* v. *Shalala*, 44 F.3d 489 (7th Cir. 1995) (debarment from providing services to drug applicants); *United States* v. *Hudson*, 14 F.3d 536 (10th Cir. 1994) (debarment from affairs of any federally insured bank), on remand on other issues, 879 F. Supp. 1113 (W.D. Okla. 1994), rev'd, 92 F.3d 1025 (10th Cir. 1996), cert. granted, 117 S. Ct. 1425 (1997); *United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992) (securities trading ban); *Manocchio* v. *Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (debarment from Medicare

programs); *United States* v. *Reed*, 937 F.2d 575 (11th Cir. 1991) (postal worker's suspension); *United States* v. *Bizzell*, 921 F.2d 263 (10th Cir. 1990) (debarment from HUD programs). Those decisions are consistent with earlier cases that recognized the remedial nature of license revocations. See, *e.g.*, *Hawker* v. *New York*, 170 U.S. 189, 196 (1898) (law prohibiting felons from practicing medicine is not punishment for purposes of the Ex Post Facto Clause because the "State is not seeking to further punish a criminal, but only to protect its citizens"); *Emory* v. *Texas State Board of Medical Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984) (revocation of medical license is not punishment because "revocation of privileges voluntarily granted is 'characteristically free of the punitive criminal element'") (citation omitted). The court of appeals' conclusion in this case, that the FAA's revocation of petitioner's airman certificate was not punishment because it was intended to promote the remedial goals of aviation safety, is to the same effect.

The court of appeals' decision is consistent with the analysis employed by this Court in *Ursery*. Under *Ursery*, the first inquiry is whether "Congress intended" revocation of an airman certificate to be "criminal or civil." 116 S. Ct. at 2147. The FAA revocation statute unambiguously states that revocation is appropriate when "safety in air commerce or air transportation and the public interest require[]" it, and thus strongly indicates that certificate revocation serves the civil, remedial aims of insuring

air safety. 49 U.S.C. App. 1429(a) (1988 & Supp. V 1993).[3]

Second, petitioner has "failed to establish by the clearest proof that Congress has provided a sanction so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty." *Ursery*, 116 S. Ct. at 2142 (internal quotation marks omitted). Even if the revocation of petitioner's airman certificate might have "certain punitive aspects, [it] serve[s] [the] important nonpunitive goal[]" of insuring air safety. *Id.* at 2148. The order revoking petitioner's certificate confirms its remedial purpose: the FAA stated that "the Administrator has determined that you are not qualified to hold an Airman Certification, in that you lack the required care, judgment, and responsibility." Pet. App. 11.

Petitioner suggests that the progressive severity in the FAA's enforcement options implies that the most severe level of enforcement must be punitive. Pet. 25-26. But as the court of appeals recognized, progressive enforcement severity is equally indicative of remedial goals: as the severity of an airman's violations increases, so too does the likelihood that air safety requires that he or she be grounded. Pet. App. 13. Further, although petitioner suggests that

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[3] The statute's general powers provision confirms that regulation of air commerce is fundamentally about assuring air safety. The Secretary of Transportation is broadly given the "duty to promote safety of flight of civil aircraft in air commerce." 49 U.S.C. App. 1421(a) (1988 & Supp. V 1993). Moreover, in issuing airman certificates, the Secretary is instructed to "give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest." 49 U.S.C. App. 1421(b) (1988 & Supp. V 1993).

a vendetta against him transformed a remedial revocation into punishment, Pet. 27, the district court thoughtfully considered the "strained relationship" between petitioner and the FAA and found of greater significance the fact that petitioner chose to violate FAA regulations rather than to seek alternate relief. Pet. App. 26-27. Those violations, not personal animosity, created the threat to air safety that required revocation of petitioner's airman certificate for the remedial purpose of maintaining air safety.[4]

2. There is also no merit to petitioner's contention that the penalty levied against him violates the Excessive Fines Clause of the Eighth Amendment. See Pet. 10-15.[5] As the court of appeals observed, the

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[4] This case need not be held for *Hudson* v. *United States*, cert. granted, 117 S. Ct. 1425 (1997), in which the petitioners have argued that the imposition for deterrent purposes of a civil monetary penalty based on banking-law violations, followed by a criminal prosecution and punishment based on the same violations, would result in multiple punishment in violation of the Double Jeopardy Clause. The central question in *Hudson* is whether the initial civil money penalty in that case constituted "punishment." Monetary penalties are sufficiently different from license revocations, that the Court's decision in *Hudson* is unlikely to affect the outcome of this case. Indeed, the court of appeals in *Hudson* concluded that an administrative sanction barring the defendants in that case from future participation in bank operations without regulators' approval was remedial and not punishment, even though it also remanded for a determination whether the civil monetary penalty imposed on the defendants should be considered punitive. *United States* v. *Hudson*, 14 F.3d 536 (10th Cir.), on remand on other issues, 879 F. Supp. 1113 (W.D. Okla. 1994), rev'd, 92 F.3d 1025 (10th Cir. 1996), cert. granted, 117 S. Ct. 1425 (1997).

[5] Petitioner also appears to advance the separate argument that the penalty did not comport with statutory standards.

penalty is well within statutory limits, was imposed after a careful balancing of the severity of petitioner's violation and his means, and bears a reasonable relationship to both the violation and the violator. Pet. App. 8.

The Excessive Fines Clause is intended to "prevent the government from abusing its power to punish." *Austin* v. *United States*, 509 U.S. 602, 607 (1993) (emphasis omitted). The inquiry under the Excessive Fines Clause generally involves a determination whether "the government is exacting too high a [monetary] penalty in relation to the offense committed." *Id.* at 622. Since *Austin*, the courts of appeals have sought to give more particularized content to this "factually intensive" inquiry. *United States* v. *829 Calle de Madero*, 100 F.3d 734, 738-739 (10th Cir. 1996) (quoting *United States* v. *Certain Real Property Located at 11869 Westshore Drive*, 70 F.3d 923, 930 (6th Cir. 1995), cert. denied, 117 S. Ct. 57 (1996)). The lower courts have agreed that the touchstone of an excessive fine is "gross disproportionality" between the amount of the fine and the violation. *United States* v. *Hines*, 88 F.3d 661, 664 (8th Cir. 1996); see *Austin*, 509 U.S. at 627 (Scalia, J., concurring) (the "touchstone" of excessive fine analysis is the "value of the fine in relation to the offense"); *829 Calle de Madero*, 100 F.3d at 738;

Pet. 15-21. That claim requires a fact-intensive inquiry into such matters as the seriousness of the violation and the ability of the violator to pay, somewhat similar to the inquiry undertaken by the court of appeals in response to petitioner's Excessive Fines Clause argument. See 49 U.S.C. App. 1471(a)(1) (1988 & Supp. V 1993). Petitioner identifies no legal issue concerning that fact-bound statutory inquiry that would warrant this Court's review.

Certain Real Property, 70 F.3d at 930; *United States* v. *One Parcel Property Located at 427 and 429 Hall Street*, 74 F.3d 1165, 1170-1172 (11th Cir. 1996); *United States* v. *Premises Known as RR No. 1, Box 224*, 14 F.3d 864, 875 (3d Cir. 1994); *United States* v. *All Right, Title and Interest in Real Property*, 77 F.3d 648, 658-659 (2d Cir.), cert. denied, 117 S. Ct. 67 (1996).[6] In addition, analysis of the excessiveness of a fine must include a substantial degree of deference to Congress's judgment concerning the seriousness of the offense. Cf. *Harmelin* v. *Michigan*, 501 U.S. 957, 998-999 (1991) (Kennedy, J., concurring in part and concurring in the judgment). Accordingly, courts conducting a disproportionality analysis have considered a number of factors, including (1) the seriousness of the offense, (2) the defendant's culpability, (3) the maximum sanction authorized by Congress, (4) the ability of the defendant to pay the fine, (5) the harshness of the sanction in combination with other sanctions imposed on the defendant, and (6)

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[6] In cases involving forfeitures, the courts have also considered the relationship of the forfeited property to the offense. See *829 Calle de Madero*, 100 F.3d at 737 (quoting *Austin*, 509 U.S. at 628 (Scalia, J., concurring in part and concurring in the judgment)). That factor has no application to this case. Accordingly, this case need not be held for *United States* v. *Bajakajian*, cert. granted, No. 96-1487 (May 27, 1997), in which the Court will consider whether the forfeiture of currency that is about to be transported outside the United States without the report required by statute is an excessive fine for the violation, the failure to file the report. Because *Bajakajian* turns in large part on factors unique to forfeiture cases, including the principle that the currency is subject to forfeiture as the instrumentality of the offense, the Court's decision in that case is unlikely to have an effect on the outcome of this case.

any personal benefit reaped by the defendant as a result of his violation. See *United States* v. *Van Brocklin*, 115 F.3d 587, 601-602 (8th Cir. 1997); *829 Calle de Madero*, 100 F.3d at 738; *Hines*, 88 F.3d at 664; *United States* v. *Granados*, 962 F.2d 767, 773-774 (8th Cir. 1992).

In this case, the district court gave thorough consideration to a variety of factors in imposing the civil penalties, and the court of appeals carefully analyzed those factors in concluding that the total amount of the penalties was not excessive. The courts below (1) considered the seriousness of petitioner's repeated violations of aviation safety regulations, Pet. App. 6, 27; (2) rejected petitioner's claims that he was not culpable because of a good faith belief that the flights were lawful, *id.* at 6, 25-26; (3) explained that the penalties imposed were one-half the maximum permitted by Congress and less than the amount requested by the government, *id.* at 5, 7, 17, 28; and (4) thoroughly considered petitioner's ability to pay the penalties, both at present and through future earnings, and imposed total penalties substantially less than those requested by the government "based on this consideration alone," *id.* at 28; see *id.* at 7-8, 22-23. The court of appeals thereupon correctly concluded that there was a "careful balance between [petitioner's] means and the justifiable punishment." *Id.* at 8. Because petitioner has identified no respect in which the legal standard applied by the courts below differs in any discernable way from the standard applied by other lower courts, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1997

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

No. Civil 94-152-JD

UNITED STATES OF AMERICA

v.

ALAN D. EMERSON, IND. AND
d/b/a EMERSON AVIATION

[Filed: March 29, 1995]

ORDER

DICLERICO, J.

The plaintiff, the United States of America, has brought this action against the defendants, Alan Emerson d/b/a Emerson Aviation ("Emerson Aviation") and Alan Emerson, individually, to recover a civil penalty of $320,000 for past violations of federal aviation law and to permanently enjoin future violations. Before the court is the defendants' motion to dismiss (document no. 11) for lack of subject matter jurisdiction. Rule 12(b)(1), Fed. R. Civ. P.[1]

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[1] The court notes that the defendants have previously filed an answer (document no. 8) and that ordinarily motions brought pursuant to Rule 12(b), Fed. R. Civ. P. must be filed

Background

On May 12, 1992, the Federal Aviation Administration ("FAA") issued an emergency order of revocation revoking the airman certificate of Alan Emerson. At all relevant times Emerson did not hold the operating certificate required for air taxi commercial operators. Further, the plaintiff alleges that during the period from November 11, 1992, through July 28, 1993, Emerson did not possess the operations specifications required under federal regulations to engage in the carriage of persons or property in air commerce for compensation or hire. Complaint, ¶ 8.

The plaintiff alleges that on eight separate occasions from November 11, 1992, to June 18, 1993, defendants Alan Emerson, individually, and Alan Emerson d/b/a Emerson Aviation operated, or caused or authorized others to use civil aircraft registration number N3570M (a Piper PA-34-200T Seneca) or civil aircraft registration number N30DF (a Piper PA-31) on round-trip passenger flights for compensation or hire from Laconia, New Hampshire, to Albany, New York. Complaint, ¶ 10. The plaintiff further alleges that on fifteen separate occasions from March 11, 1993, to July 28, 1993, the defendants operated, or caused or authorized others to use civil aircraft registration numbers N3570M or N30DF on round-trip passenger flights for compensation or hire from Laconia, New Hampshire, to Islip, New York. *Id.*, ¶ 11. According

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"before pleading if a further pleading is permitted." *Id.* However, Rule 12(h)(3) provides, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Therefore the defendants Rule 12(b)(1) motion was timely filed.

to the plaintiff, when the defendants authorized others to operate the flights at issue, these individuals were not qualified pilots under 14 C.F.R. §§ 135.293(a)[2] and 135.295.[3] *Id.*, ¶ 14. The plaintiff

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[2] Title 14 C.F.R. § 135.293 provides,

§ 135.293 Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas— (1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for—

(i) Recognizing and avoiding severe weather situations; (ii) Escaping from severe weather situations, in

case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and (iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

14 C.F.R. § 135.293(a) (1994).

[3] Title 14 C.F.R. § 135.295 provides,

§ 135.295 Initial and recurrent flight attendant crewmember testing requirements.

No certificate holder may use a flight attendant crewmember, nor may any person serve as a flight attendant crewmember unless, since the beginning of the 12th calendar month before that service, the certificate holder has determined by appropriate initial and recurrent testing that the person is knowledgable and competent in the following areas as appropriate to assigned duties and responsibilities—

(a) Authority of the pilot in command;

(b) Passenger handling, including procedures to be followed in handling deranged persons or other persons whose conduct might jeopardize safety;

(c) Crewmember assignments, functions, and responsibilities during ditching and evacuation of persons who may need the assistance of another person to move expeditiously to an exit in an emergency;

(d) Briefing of passengers;

(e) Location and operation of portable fire extinguishers and other items of emergency equipment;

(f) Proper use of cabin equipment and controls;

further alleges that in connection with the above-mentioned flights the defendants violated 14 C.F.R. § 135.31[4] by advertising or otherwise offering to perform charter flight operations for which they failed to possess either the proper certification or the required operations specifications. Complaint, ¶ 15.

Pursuant to the Federal Aviation Act at 49 U.S.C.A. § 1471, the plaintiff contends that each defendant is subject to a civil penalty not to exceed $10,000 for each of the thirty-two violations alleged in the complaint, for a total not to exceed $320,000. Complaint, ¶ 16.

On February 14, 1995, the court issued a preliminary injunction requiring, *inter alia*, that each of the defendants refrain from performing any aviation related acts unless and until they validly possess the proper FAA authority to do so.

(g) Location and operation of passenger oxygen equipment;

(h) Location and operation of all normal and emergency exits, including evacuation chutes and escape routes; and

(i) Seating of persons who may need assistance of another person to move rapidly to an exit in an emergency as prescribed by the certificate holder's operations manual.

14 C.F.R. § 135.295 (1994).

[4] Title 14 C.F.R. §135.31 provides,

§ 135.31 Advertising.

No certificate holder may advertise or otherwise offer to perform operations subject to this part that are not authorized by the certificate holder's operating certificate and operations specifications.

14 C.F.R. § 135.31 (1994).

Discussion

The defendants assert, *inter alia*, that the court lacks subject matter jurisdiction to adjudicate the plaintiff's claims because the plaintiff has not exhausted its administrative remedies before the National Transportation Safety Board ("NTSB"), that the plaintiff's claims are untimely under the NTSB's "stale complaint" rule, that the FAA lacks authority to maintain its claims, and that the exercise of the court's jurisdiction would violate the double jeopardy clause of the United States Constitution. See Plaintiff's Motion to Dismiss ("Motion to Dismiss") at ¶¶ 3-7. In response, the government argues that the court's exercise of subject matter jurisdiction is consistent with the governing statutes and would not impinge on the defendants' constitutional rights.

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Fed. R. Civ. P., challenges the statutory or constitutional power of the court to adjudicate a particular case. 2A Moore's Federal Practice ¶ 12.07 (2d ed.1994). In ruling upon a motion to dismiss for lack of subject matter jurisdiction, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

I. Statutory Authority for Federal District Court Jurisdiction

The plaintiff asserts that the court has exclusive jurisdiction over its action pursuant to the appropriate federal statutes. Government's Objection to

Defendants' Motion to Dismiss at 2-6. Under 49 U.S.C.A. § 1430,

> (a) It shall be unlawful—
>
> * * * *
>
> (2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this subchapter.
>
> (4) For any person to operate as an air carrier without an air carrier operating certificate, or in violation of the terms of any such certificate;
>
> (5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter.

49 U.S.C.A. § 1430(a)(2)(4)(5) (West 1976). Section 1430 is contained in subchapter VI of the Federal Aviation Act, which addresses the safety regulation of civil aeronautics. See 49 U.S.C.A. §§ 1421-1432 (subchapter VI). The regulations at issue, 14 C.F.R. §§ 135.31, 135.293 and 135.295, were promulgated pursuant to subchapter VI. See Air Taxi Operators and Commercial Operators Rules, 14 C.F.R. Part 135 at 578 (1994) (indicating that Part 135 was promulgated pursuant to 49 U.S.C. §§ 1421-1431, in addition to 49 U.S.C. §§ 1354(a) (stating certain broad powers

and duties of the Administrator), 1355(a) (authorizing the Administrator to delegate powers and duties related to the issuance of certificates under subchapter VI), 1502 (dealing with international agreements) and 49 U.S.C. § 106(g) (revised Pub.L. No. 97-449, January 12, 1983) (authorizing the FAA administrator to carry out certain duties of the Secretary of Transportation).

In pertinent part, 49 App. U.S.C.A. § 1471 provides,

> (a)(1) Any person who violates (A) any provision of subchapter III, IV, V, VI, VII, or XII of this chapter or of section 1501 or 1514, or 1515(e)(2)(B) of this title or any rule, regulation, or order issued thereunder, or under section 1482(i) of this title, or any term, condition, or limitation of any permit or certificate issued under subchapter IV of this chapter, or (B) any rule or regulation issued by the United States Postal Service under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation, except that a person who operates aircraft for the carriage of persons or property for compensation or hire (other than an airman serving in the capacity of an airman) shall be subject to a civil penalty of not to exceed $10,000 for each violation of subchapter III, VI, or XII of this chapter, or any rule, regulation, or order issued thereunder, occurring after December 30, 1987.
>
> * * * *

(3) Administrative assessment

(A) General authority

Upon written notice and finding of a violation by the Administrator, the Administrator, or the delegate of the Administrator, may assess a civil penalty for a violation of subchapter III, V, VI, or XII of this chapter or subsections (c) and (d) of this section, section 1501 or 1515(e)(2)(B) of this title or any rule, regulation, or order issued thereunder.

* * * *

(C) Continuing jurisdiction of district courts

Notwithstanding subparagraph (A), the United States district courts shall have exclusive jurisdiction of any civil penalty initiated by the Administrator—

(i) which involves an amount in controversy in excess of $50,000.

* * * *

(iv) in which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

49 App. U.S.C.A. §§ 1471(a)(1), 1471(a)(3)(A), 1471(a)-(3)(C)(i) and (iv) (West 1994).

The defendants are charged with thirty-two violations of regulations promulgated under 49 U.S.C.A. § 1430(a)(2), (4) and (5). Pursuant to 49 App. § 1471(a)(1), each of these violations carries a civil

penalty not to exceed $10,000; thirty-two violations carry an aggregate civil penalty not to exceed $320,000. Because this amount in controversy exceeds $50,000 the court has exclusive jurisdiction over the plaintiff's civil penalty claims under 49 App. § 1471(a)(3)(C)(i). Further, under 49 App. § 1471(a)(3)(C)(iv), the court has exclusive jurisdiction of the plaintiff's claim for injunctive relief because this claim is based on the violation giving rise to the civil penalties at issue.

II. Exhaustion of Administrative Remedies

Section 1471(a)(1) specifies the circumstances in which civil penalties must be determined by the administrative agency:

> The amount of any such civil penalty which relates to the transportation of hazardous materials shall be assessed by the Secretary, or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing. . . . The amount of any such civil penalty for any violation of any provision of subchapter IV of this chapter, or any rule, regulation, or order issued thereunder, or under section 1482(i) of this title, or any term, condition, or limitation of any permit or certificate issued under subchapter IV of this chapter shall be assessed by the Board only after notice and an opportunity for a hearing and after written notice upon a finding of violation by the Board.

Section 1471(a)(1) requires an administrative assessment of a civil penalty

> in only three instances: (1) if the penalty 'relates to the transportation of hazardous materials,' (2) if the penalty is imposed for 'violation of any provision of subchapter IV of this chapter,' which relates to the economic regulation of air carriers, or (3) if the penalty issues for violations under 49 U.S.C. § 1482(i), which governs establishment of through service and joint fares within the states of Alaska and Hawaii and for overseas flights. 49 U.S.C. § 1471(a)(1); see *United States v. Kilpatrick*, 759 F.2d 1250, 1252-53 (5th Cir.1985).

United States v. Gaunce, 779 F.2d 1434, 1436 (9th Cir.1986).

The defendants argue that the NTSB must impose a civil penalty before the jurisdiction of the federal district court can be established under 49 U.S.C. § 1471(a). Defendants' Motion to Dismiss at 1-3.

Where a civil penalty is sought for alleged violations of regulations promulgated under subchapter VI, no administrative assessment is required by section 1471(a)(1). *Gaunce*, 779 F.2d at 1436.

Because the civil penalties at issue in this case are sought for alleged violations of regulations promulgated under subchapter VI, the court finds that no administrative assessment of such penalties is required for the court to exercise jurisdiction pursuant to 49 App. U.S.C.A. §§ 1471(a)(3)(C)(i) and (iv).

III. The "Stale Complaint" Rule

The defendants next assert that the plaintiff's action is barred by the NTSB's "stale complaint" rule, set forth at 49 C.F.R. § 821.33 (1994), because the complaint was brought more than six months after the offenses at issue allegedly occurred.

> The provisions of [49 U.S.C. Part 821] govern all air safety proceedings, including proceedings involving airman medical certification, before a law judge on petition for review of the denial of any airman certificate or on an appeal from any order of the [FAA] Administrator amending, modifying, suspending or revoking any certificate. The provisions of this part also govern all proceedings on appeal from an order of the Administrator imposing a civil penalty on a flight engineer, mechanic, pilot, or repairman, where the underlying violation occurred on or after August 26, 1992, and all proceedings on appeal to the Board from any order or decision of a law judge.

49 C.F.R. § 821.2 (1994).

Section 821.33 is a provision governing administrative air safety proceedings which does not apply to claims properly brought in a federal district court. Because the plaintiff's claims are properly before the court pursuant to 49 App. U.S.C.A. § 1471(a)(3)(C)(i) and (iv), section 821.33 does not apply to the plaintiff's action.

IV. Double Jeopardy

The defendants next assert that "Emerson's rights to defend properly are before an administrative law judge until the FAA's complaint has been adjudicated. To subject him to this Court's jurisdiction now places him in the unconstitutional position of 'double jeopardy.'" Defendants' Motion to Dismiss, ¶ 7. Further, they contend that "[b]y seeking such a penalty simultaneously with an order of emergency revocation the Plaintiff is pursuing an excessive degree of enforcement amounting to harassment and intimidation. *Id.*, ¶ 3.

"[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989). Under the Double Jeopardy Clause, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Halper*, 490 U.S. at 448. A civil penalty qualifies as punishment in "the rare case" where the penalty is "overwhelmingly disproportionate" to the damage caused. *Halper*, 490 U.S. at 449. "Removal of persons whose participation in [government] programs is detrimental to public purposes is remedial by definition." *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir.1990).

The FAA revoked the airman certificate of Alan Emerson for alleged violations of federal regulations designed to promote air safety. The violation of such

regulations would obviously be detrimental to public purposes. Therefore, the court finds that the FAA's revocation of Emerson's air certificate was remedial rather than punitive and the Double Jeopardy Clause is not implicated by the plaintiff federal claims. Further, and nothwithstanding the court's finding as to the emergency order of revocation, the court finds that the Double Jeopardy Clause is not implicated in this case because the civil penalties sought by the plaintiff are not overwhelmingly disproportionate to the damage inherent in the alleged conduct of the defendants.

Conclusion

For the reasons set forth above, the court finds that it may properly exercise subject matter jurisdiction over the plaintiff's action. The motion to dismiss (document no. 11) is denied.

SO ORDERED.

APPENDIX B

Tel: (617) 238-7045
FAX: (617) 238-7055
93NE050055

February 16, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED, FEDERAL EXPRESS, AND FIRST CLASS MAIL

Mr. Alan D. Emerson
d/b/a Emerson Aviation
80 Kimball Road
Laconia, NH 03246-9508

EMERGENCY ORDER OF REVOCATION

Take notice that upon consideration of a report of investigation, it appears that you violated the Federal Aviation Regulations, hereinafter specified by reason of the following circumstances:

1. You are the holder of Airman Certificate No. 2130849 with Commercial Pilot privileges.

2. Also, at all times pertinent herein, you were the owner and operator of Emerson Aviation, Laconia, New Hampshire.

3. On the following dates, without limitation, you operated or caused or authorized others to use civil aircraft N357OM, a Piper PA-34-200T Seneca, owned by another, or N30DF, a Piper PA-31, on round-trip passenger carrying flights for compensation or hire from Laconia, New Hampshire to Albany, New York:

DATE	Laconia Departure	Albany Departure	#of Passengers
November 11, 1992	9:00 a.m.	4:30 p.m.	2
December 4, 1992	9:00 a.m.	5:00 p.m.	3
December 15, 1992	9:00 a.m.	5:00 p.m.	2
February 18, 1993	9:00 a.m.	5:00 p.m.	3
April 20, 1993	9:15 a.m.	5:00 p.m.	3
June 16, 1993	9:00 a.m.	5:00 p.m.	3
June 17, 1993	9:00 a.m.	5:00 p.m.	4
June 18, 1993	9:00 a.m.	5:00 p.m.	4

4. Additionally, on the following dates, without limitation, you operated or caused or authorized others to use N357OM or N30DF on round-trip passenger carrying flights for compensation or hire from Laconia, New Hampshire to Islip, New York.

a. March 11, 1993
b. March 12, 1993
c. March 25, 1993
d. March 26, 1993
e. April 14, 1993
f. April 15, 1993
g. April 28, 1993
h. April 29, 1993
i. May 1, 1993
j. May 17, 1993 (2 flights)
k. May 18, 1993
l. May 24, 1993
m. May 25, 1993
n. July 27, 1993
o. July 28, 1993

5. Each of the flights specified in paragraphs 3 and 4 above were conducted when you did not hold an Air Taxi Commercial Operator (ATCO) operating certificate nor appropriate operations specifications.

6. You operated or caused or authorized others to operate the flights specified in paragraphs 3 and 4 above when you/they were not qualified to do so under Part 135.

7. You served as pilot and used other pilots on the flights referred to in paragraphs 3 and 4 above when, since the beginning of the 12th calendar month before that service, you/they had not:

(a) passed a written or oral test, given by the Administrator or an authorized check pilot, on your/their knowledge of the areas set forth in Section 135.293(a) of the Federal Aviation Regulations;

(b) passed a competency check, given by the Administrator or an authorized check pilot, in that type of aircraft to determine your/their competence in practical skills and techniques in that aircraft; and

(c) completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve.

8. Additionally, incident to said flights, you advertised or otherwise offered to perform charter flight operations for which you did not hold a certificate or operations specifications.

9. Under these circumstances, you failed to comply with the requirements of Part 135 of the Federal Aviation Regulations while operating numerous Part 135 flights.

10. Your operation of and your causing or authorization of others to use aircraft, in the manner and under the circumstances described above was careless and/or reckless so as to endanger the lives and property of others.

By reason of the foregoing facts and circumstances, you violated the following Federal Aviation Regulations:

(a) Section 135.3(a), in that you failed to comply with the applicable rules of Part 135 of the Federal Aviation Regulations while operating an aircraft inside the United States.

(b) Section 135.5, in that you operated an aircraft under Part 135 without a Part 135 Operation Certificate and appropriate operations specifications issued under Part 135 of the Federal Aviation Regulations.

(c) Section 135.31, in that you advertised or otherwise offered to perform operations subject to Part 135 of the Federal Aviation Regulations when not authorized to.

(d) Section 135.293(a), in that you served as a pilot and used pilots under Part 135 in aircraft when, since the beginning of the 12th calendar month before that service, you and other pilots on your behalf had not passed a written or

oral test, given by the Administrator or an authorized check pilot.

(e) Section 135.293(b), in that you served as a pilot and used pilots under Part 135 in aircraft when, since the beginning of the 12th calendar month before that service, you and other pilots on your behalf had not passed a competency check given by the Administrator or an authorized check pilot in that type of aircraft.

(f) Section 135.343, in that you served and used pilots as crewmembers in operations under Part 135 when since the beginning of the 12th calendar month before that service you/they had not completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve.

(g) Section 91.13(a), in that you operated and caused or authorized others to use aircraft in a careless and/or reckless manner so as to endanger the lives and property of others.

(h) Section 610(a)(3) of the Federal Aviation Act, in that you unlawfully employed for service in connection with any civil aircraft used in air commerce airmen who do not have airmen certificates authorizing them to serve in the capacity for which they are employed.

(i) Section 610(a)(4), in that you unlawfully operated as an air carrier without an air carrier operating certificate.

PRIOR VIOLATIONS/ORDERS

Furthermore, records of the Federal Aviation Administration reveal the following:

a. On June 24, 1992, NTSB ALJ Coffman, affirmed the FAA's Emergency Order of Revocation, dated May 12, 1992, revoking your Airman Certificate No. 2130849 for violations of the Federal Aviation Regulations. (14 C.F.R. Parts 135.5, 135.293(a)(2) and 91.13(a)).

b. Also on June 24, 1992, NTSB ALJ Coffman, affirmed the FAA's Emergency Order of Revocation, dated May 12, 1992, revoking Emerson Aviation's Air Taxi Certificate No. FTFA023E for violations of the Federal Aviation Regulations (14. C.F.R. Parts 135.5 and 135.293(a)(2)).

c. On March 9, 1992, Emerson Aviation's Air Taxi Certificate No. E15-316, was retroactively suspended for 365 days by an Order of Suspension for numerous violations of the Federal Aviation Regulations.

d. On August 9, 1991, your CFI Certificate No. 2130849 was revoked for making intentionally false endorsements in student records. Said revocation was upheld by NTSB ALJ Fowler.

e. On November 2, 1990, the FAA issued an Order of Suspension suspending your Airman Certificate No. 2130894 for 90 days for entering the Pittsburgh TCA without having appropriate ATC authorization. Said Order was upheld by NTSB ALJ Fowler.

QUALIFICATIONS

By reason of the foregoing facts and circumstances, the Administrator has determined that you are not qualified to hold an Airman Certificate, in that you lack the required care, judgment, and responsibility. Therefore, the Administrator finds that the safety in air commerce or air transportation and the public interest require the revocation of your Airman Certificate No. 2130849, with all its ratings and privileges. Furthermore, the Administrator finds that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of this Order.

NOW THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Sections 609(a) and 1005(a) of the Federal Aviation Act of 1958, as amended, that:

(1) Your Airman Certificate No. 2130849, with all its ratings and privileges be and hereby is revoked.

(2) This Order is effective immediately.

(3) You are directed to surrender immediately your Airman Certificate No. 2130849, will all its ratings and privileges by mailing it, or delivering it, to:

Assistant Chief Counsel, Room 311
Federal Aviation Administration, ANE-7
12 New England Executive Park
Burlington, MA 01803-5299

AMY L. CORBETT
Assistant Chief Counsel

JOHN R. DONNELLY
Attorney, ANE-7

APPEAL

You may appeal this Order by filing an original and four copies of a Notice of Appeal with the National Transportation Safety Board, Office of Judges, Room 5531, 490 L'Enfant Plaza East, S.W., Washington, DC 20594, telephone (202) 382-0650, FAX (202) 382-0658. Any Notice of Appeal must be filed within ten (10) days of the day this Order was served. You must also mail a copy of your Notice of Appeal to this office. In view of the fact that the Administrator has determined that an emergency exists requiring the immediate effectiveness of the Order, the revocation of your certificate will remain in effect during the period of any appeal proceedings before the National Transportation Safety Board. You are hereby advised that if you appeal, a copy of this Order will be filed with the National Transportation Safety Board and will be considered the Administrator's Complaint. In any event, you must surrender said certificate immediately as directed in the Order.

cc: Sandra McDonough, Esquire
3333 Main Street
Stratford, CT 06497

Gretchen Witt, Esquire
U.S. Attorney's Office
Chief, Civil Division, Room 312
55 Pleasant Street
Concord, New Hampshire 03301

bc: ANE-200, FSDO-05 (Gary H. Readio),
AVN-460 RFile
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RFILE:JDONNELLY:jg:2/2/94:Final:jg:2/15/94